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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On June 2nd, the Supreme Court adopted rules changes recommended by the Civil Practice Committee. The changes are effective July 1st. A copy of the per curiam order was included in the weekly mailout.

Also, on June 2nd, the Supreme Court published for comment proposed rules for sealing and redacting court documents. The comment period expires on August 1st, and a copy of the proposal was included in the weekly mailout.

CRIMINAL

Scales v. State: **[peremptory challenge]** The trial court did not abuse its discretion in denying appellant's request to use a peremptory challenge to strike a juror after the jury was seated. (Pope, S.; CACR 10-1039; 6-1-11; Vaught).

Jones v. State: **[jury instruction]** Because the proffered jury instruction was an incomplete statement of the law, the trial court did not abuse its discretion by refusing to give the proffered instruction and by giving the applicable model instruction. (Pope, S.; CACR 11-101; 6-1-11; Hart).

Penister v. State: **[motion to suppress]** Appellant's vehicle was properly stopped pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure. Accordingly, the trial court did not err in denying appellant's motion to suppress the evidence that was obtained during the stop. (Henry, D.; CACR 10-579; 6-1-11; Gladwin).

Moten v. State: **[waiver of jury trial]** Appellant waived his right to a jury trial in writing and

through his attorney in open court. The record established that appellant's waiver was made in accordance with the Arkansas Rules of Criminal Procedure. Thus, the trial court did not err in holding a bench trial rather than a jury trial in appellant's case. (Henry, D.; CACR 10-980; 6-1-11; Martin).

Vance v. State: **[suppression of evidence]** The circuit court concluded that appellant voluntarily gave a saliva sample and several statements to law enforcement officials. The court further found that the statements were not the result of coercion and were given after valid waivers of certain constitutional rights. On appeal, the Supreme Court considered the totality of the circumstances and concluded that the trial court's rulings were not clearly against the preponderance of the evidence. **[404(b)]** The circuit court did not abuse its discretion when it allowed evidence concerning an earlier burglary and rape to be admitted at appellant's trial. The evidence was independently relevant on the issues of intent, scheme, or plan and the two crime sprees were sufficiently similar. **[expert testimony]** Because the proffered testimony was on an issue that was not beyond the ability of a jury to understand, and because the proffered testimony would have invaded the jury's function as the trier of facts, the circuit court did not abuse its discretion when it excluded the testimony of two expert witnesses from appellant's trial. (Piazza, C.; CR 10-598; 6-2-11; Corbin).

Bond v. State: **[404 (b)]** The trial court did not abuse its discretion when it admitted evidence of contraband that was found in appellant's house eight months after the crime for which he was charged occurred because the contraband was relevant to appellant's intent and his lack of mistake. (Cox, J.; CACR 11-20; 6-15-11; Pittman).

Hobbs v. Baird: **[repeal by implication]** Arkansas Code Annotated § 12-29-201 did not repeal by implication the language in Ark. Code Ann. § 16-90-121. **[good-time credit]** Because Ark. Code Ann. § 12-29-201 instructs that good-time credit is to be applied to an inmate's transfer-eligibility date, that time shall be applied to decrease the time an inmate is required to be imprisoned before he becomes eligible for parole. The language in Ark. Code Ann. § 16-90-121 instructing that a sentence would be "subject to reduction by meritorious good-time credit" applies in those case where an inmate is sentenced to more than ten years. In such cases, the inmate is required to serve a minimum ten-year sentence, with no eligibility for parole during that period of time. The good-time credit can then be applied to the parole-eligibility date after the inmate has served ten years. (Dennis, J.; 11-123; 6-16-11; Danielson).

Arnold v. State: **[speedy trial]** The State satisfied its burden by establishing that the disputed period of time was properly excluded because it was based upon a delay resulting from other proceedings concerning the appellant that were pending in a separate county. Thus, the speedy-trial rule was not violated and the trial court properly denied appellant's motion to dismiss. (Storey, W.; CACR 10-1086; 6-22-11; Glover).

Bates v. State: **[admission of evidence]** It was error for the circuit court to admit the results from appellant's blood test into evidence because the State failed to establish that the test was conducted pursuant to Ark. Code Ann. § 5-65-204 (d)(i). (Gibson, B.; CACR 10-1299; 6-22-11; Gladwin).

Wade v. State: **[illegal sentence]** Appellant received an illegal sentence when he received probation after pleading guilty to simultaneous possession of drugs and a firearm, a Class Y felony. (Burnett, C.; CACR 10-542; 6-29-11; Hart).

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Vance v. State: (rape) CACR 10-1316; 6-1-11; Glover.

Phillips v. State: (failure to register as a sex offender) CACR 10-1131; 6-1-11; Wynne.

Lovett v. State: (possession of cocaine with intent to deliver) CACR 11-105; 6-1-11; Martin.

Lunsford and Evans v. State: (robbery) CACR 11-86; 6-15-11; Brown.

Dishman v. State: (possession of cocaine with intent to deliver) CACR 11-38; 6-15-11; Martin.

Morton v. State: (DWI) CACR 10-1231; 6-15-11; Robbins.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Bass v. State: (probation) CACR 11-25; 6-22-11; Martin.

CIVIL

Greenway Land Co. v. Hinchey: **[partition]** Court's order granting partition in kind was proper. (Story, B.; CA 11-156; 6-1-11; Pittman)

Myers v. Cooper Clinic, P.A.: **[res ipsa loquitur]** A prima facie case of negligence based upon res ipsa loquitur was not established because the plaintiff failed to establish the element of the absence of evidence to the contrary. That is, the defendant contradicted plaintiff's attempt to apply the doctrine by showing that it had exercised proper care. (Cox, J.; CA 10-689; 6-15-11; Glover)

Johnson v. Ark. Prof. Bail Bondsman Licensing Bd.: **[appeal]** Appeal from Board's action to circuit court was untimely. Court dismissed the appeal. Bondsman attempted to vacate judgment under Rule 60 but failed to satisfy the grounds to do so. (Brantley, E.; CA 10-1114; 6-15-11; Vaught)

Scott v. Wolf: **[warning order/default]** Plaintiff failed to make a diligent inquiry as to defendant's whereabouts before attempting to obtain service by warning order. Accordingly, the default judgment was void ab initio. (Shirron, P.; CA 10-1267; 6-15-11; Martin)

Marx Real Estate Investments, LLC v. Coloso: **[election of remedies]** Plaintiff's complaint sought alternative remedies under the contract for damages and rescission of the contract. Plaintiff does not have to make an election of his remedies until it is time to instruct the jury. (Tabor, S.; CA 09-1363; 6-15-11; Vaught)

Gibbs v. Primelending Co.: **[certified question answered --personal jurisdiction]** The use of the conspiracy theory of in personam jurisdiction does not violate the long-arm statute. (SC 10-1250; 6-16-11; Hannah)

Ark. Teachers Retirement System v. Short, Garland County Collector: **[property tax]** Property owned by the Teachers Retirement System was not exempt from ad valorem tax because the property, a shopping center, was not used exclusively for a public purpose. (Williams, L.; SC 11-132; 6-616-11; Henry)

Mountain Pure, LLC v. Little Rock Wastewater Utility: **[administrative appeal]** District Court Rule 9 applies to this appeal from circuit court which affirmed the decision of the Wastewater Utility. The administrative decision was supported by substantial evidence and was neither arbitrary nor capricious. (Fox, T.; SC 11-17; 6-16-11; Gunter)

Riley v. State Farm Ins: (Clinger, D.; SC 10-1220; 6-16-11; Brown); *Baxter v. State Farm Ins*: (Clinger, D.; SC 10-1226; 6-16-11; Danielson); *Brantley v. State Farm Ins*: (Clinger, D.; SC 10-1221; 6-16-11; Gunter) **[subrogation]** Insurer failed to establish a legal lien or right to subrogation. Trial court erred in finding that right to subrogation arose at the time insurer paid medical benefit; rather, absent an agreement or settlement, an insurer's right to subrogation does not accrue until there has been a legal determination by a court that the insured has been made whole.

First Electric Coop. v. Copley: **[contracts/limitations]** Ark. Code Ann. 16-56-112 prohibits parties to a construction contract from extending the five-year limitations period. (McGowan, M.; CA 10-1257; 6-22-11; Gladwin)

Bishop v. Tariq, Inc.: **[negligence]** Court improperly excluded evidence of defendant's failure to install a lifeline separating the shallow and deep ends of the hotel's pool. (Brantley, E.; CA 10-492; 6-22-11; Hart)

Unknown Heirs of Warbington v. First Community Bank: **[service]** The return of service is prima facie evidence of service, and party failed to rebut proof of service. Service of one of the defendants by warning order was proper. (Davis, B.; CA 10-1093; 6-23-11; Baker)

Forrster v. Martin: **[constitutional amendment]** Ballot title met legal requirements and was not misleading. Legislature is permitted to propose one amendment. In this case, it is claimed that three separate amendments were submitted under one title. So long as all parts of the amendment are reasonably germane to each other and to the general subject of the amendment, there is no violation. In this case, they are. The general subject is economic development and debt obligations. (McGowan, M.; SC 11-112; 6-23-11; Hannah)

May Constr. Co. v. Town Creek Constr. Co.: **[construction lien priority]** Materialmen's lien related back to the date that the construction commenced, which is when there is a visible manifestation of construction activity (Gunn, M.; SC 09-1238; 6-23-11; Henry)

Philadelphia Indemnity Ins. Co. v. Austin: **[insurance]** Policy was ambiguous as to whether the limits of liability was one or two million dollars. (Fogleman, J.; SC 11-81; 6-23-11; Henry)

Payne v. Donaldson: **[attorney's fees]** Court did not abuse its discretion in award of attorney's fees. (Glover, D.; CA 10-1238; 6-29-11; Gladwin)

Cobren v. Anderson: **[contract]** Evidence supported court's finding that parties had an express contract to loan money with an obligation to repay. Court's imposition of an equitable lien on real property to secure repayment of the loan was proper. (Sullivan, T.; CA 10-776; 6-29-11; Martin)

DOMESTIC RELATIONS

Myers v. McCall: **[child support; medical expenses]** The judgment entered by the circuit court was not a final and appealable judgment. Two issues remained for the circuit court to rule on, so the Court of Appeals lacked jurisdiction, and dismissed the appeal without prejudice. (Spears, J.; No. CA 10-1210; 6-1-11; Hart).

Hamilton v. Office of Child Support Enforcement, et al.: **[paternity; child custody]** The trial court found that the appellant father had satisfied the statutory criteria for custody of his child in Ark. Code Ann. Sec. 9-10-113 (regarding paternity) except for best interest. The Court of Appeals said that the determination that it was not in the female child's best interest to award custody to the father was based on an improper consideration of the sex of the parent. Arkansas Code Ann. Sec. 9-13-101 abolished gender-based presumptions or preferences for child custody in divorce cases and applies equally to paternity cases. The court reversed and remanded for the circuit court to determine custody without regard to the sex of the parent. In addition, the court encouraged appointment of an attorney ad litem should further proceedings be required, since the trial court had stated that the interests of the child would be best served by such an appointment. (Singleton, H.; No. CA 10-1010; 6-1-11; Pittman).

Tribble v. Tribble: **[child custody]** The Court of Appeals found that the trial court did not err in awarding custody of the child to the appellee father. The court said the testimony supported the trial court's findings. (Smith, P.; No. CA 11-32; 6-1-11; Robbins).

Bellamy v. Bellamy: **[divorce–division of property and allocation of debt]** The appellant wife appealed the trial court's decision permitting the appellee to retain all of his military retirement benefits. The trial court found that awarding the appellee all of his military retirement benefits would result in an unequal distribution of marital assets, but that he was also being assessed the bulk of the marital debt. In reversing, the Court of Appeals said that its decision was governed by *Broggi-Dunn v. Dunn*, 2011 Ark. App. 56. The court said that when a trial court fails to compare the amount of debt from which the non-receiving spouse was relieved to the amount and duration of retirement benefits of which he/she was deprived, this compels reversal and remand. Here, the husband was ordered to pay the vast majority of marital debts. However, his portion of the military benefits would pay the outstanding indebtedness within a few years. His continued receipt of the entire monthly benefit would result in a substantial windfall to him. The case was remanded for the court to determine an equitable division of the marital portion of the military pension in light of the circumstances of this case. (Huckabee, S.; No. CA 11-90; 6-15-11; Robbins).

Wills v. Lacefield: **[Arkansas Domestic Abuse Act proceedings; Arkansas Rules of Civil Procedure]** The Supreme Court held that proceedings under the Domestic Abuse Act are "special proceedings" within the meaning of Arkansas Rule of Civil Procedure 81. The procedure for securing a protective order pursuant to the act is purely statutory. A purpose of the act is to afford protection for certain victims of abuse that is not available outside of the act. The remedies available are unknown under common law and are completely governed by statute. To the extent the statutes creating the special proceedings provide for a procedure that differs from the rules of civil procedure, the rules of civil procedure do not apply. (Putman, J.; No. SC 10-568; 6-16-11; Baker).

Kelly v. Kelly: **[divorce–property]** To the extent that spouses acquire an enforceable right during the marriage, they acquire marital property. Here, the share of stock in a business which the appellee acquired during the marriage is marital property. It does not fall into a statutory exception, nor was it a gift. The trial court's decision that it was nonmarital property was reversed and the case was remanded. In light of the remand, the court found it unnecessary to consider the appellant's second issue relating to the allocation of marital debt, since that must be considered in the context of the distribution of all of the parties' property. (Moore, R.; No. SC 10-60; 6-16-11; Danielson).

Boudreau v. Pierce: **[custody; visitation]** The Court of Appeals affirmed the change of custody from the appellant mother to the appellee father based upon a material change in circumstances and the best interests of the children. The court reversed that part of the order for supervised visitation for the children and remanded for a hearing to determine whether visitation should remain supervised based upon factors the court set out. (Martin, W.; No. CA 11-47; 6-22-11; Hoofman).

Kilman v. Kennard: **[visitation; contempt]** The circuit court found both parties, parents of a child, in contempt. The appellant father was sentenced to 180 days in jail, with all but thirty days suspended. The appellee mother was found in contempt and sentenced to forty-five days, with all but five days suspended. The Court of Appeals noted the "acrimonious relationship" between the parties, outlining a history of contention between the two. The appellant had been found in contempt on four or five previous occasions for failure to follow the orders of the court. The Court of Appeals said that the contempt in question was criminal contempt because it was punitive in nature and neither party had the opportunity to purge the contempt. The trial court erred by including previously-imposed suspended sentences with the sentence for the present contempt, but found reversal was not necessary. Although the court included seventy-five days it had previously sentenced the appellant to serve, it suspended all but thirty days, which amounted to a complete remission of 150 days. The sentence was not excessive for a parent's failure to return a child from visitation timely. The court also found that the trial court's sanctions against the appellee mother, a sentence of forty-five days, with all but five days suspended, were not inadequate. Unlike the appellant, she had never been held in contempt before. (Weaver, T.; No. CA 10-1242; 6-22-11; Abramson).

Tiner v. Tiner: **[divorce; property settlement agreement; judgment]** The parties entered into a property settlement agreement, whereby the appellee husband agreed to pay the appellant wife a lump sum for her one-half interest in the parties' business. When he failed to pay, she moved for and was granted a writ of immediate execution. The circuit court thereafter granted the appellee's emergency motion to set aside the writ of execution. The appellant appealed from that order. She also amended her notice of appeal to include a subsequent order entered after the record had been lodged. The appellant contended the trial court erred in issuing an ex parte order enjoining her enforcement of the writ of execution based on unverified allegations in appellee's motion to set aside the writ. She contended the order was void. The court said the reliance on appellee's unverified allegations of irreparable harm was improper, but that the court reached the right result, if even for the wrong reason. Its decision should have been based on the lack of a judgment. The property settlement was an independent contract, incorporated, but not merged, into the divorce decree. The provision for the husband to pay the wife a lump-sum payment was not a judgment which the trial court could enforce through execution against appellee's real property and assets. The Court of Appeals affirmed the court's first order. However, the trial court's subsequent order was entered without jurisdiction, because the appellant had already lodged the record on appeal, which deprived the circuit court of jurisdiction over the parties and the subject matter in controversy. That portion of the appeal was dismissed. (McCallister, B.; No. CA 10-1302; 6-29-11; Martin).

Wagner v. Wagner: **[child custody–change in custody; motion to dismiss]** It is the circuit court's duty, in deciding a motion to dismiss made after the presentation of the plaintiff's case, to determine whether, if the case were a jury trial, there is sufficient evidence to present to a jury. The circuit court does not exercise its fact-finding powers, such as judging the witnesses' credibility, in making the determination. The Court of Appeals said that here, some of the circuit court's findings showed that it was not giving the appellant's evidence its highest probative value and was exercising its fact-finding powers. If it had been a jury trial, the court said, there would be a question for the jury. (Singleton, H.; No. CA 11-21; 6-29-11; Abramson).

Walker v. Burton: **[name change]** The appellant alleged that he was denied due process when the appellees, custodians of the child, changed the natural child's surname to theirs without giving him notice and the opportunity to defend his fundamental parental rights. The Court of Appeals declined to reach the merits of the argument because the appellant failed to raise it below. Arguments, even constitutional ones, may not be raised for the first time on appeal. The appellant also alleged that the appellees had failed to meet their burden of proving the factors set out in *Huffman I* regarding a name-change petition. The court said that the circuit court's order specifically stated that the *Huffman* factors had been satisfied and that it was in the best interest of the chid to grant the petition for change of the surname. Evidence was presented at the hearing in support of each factor. (Johnson, K..; No. CA 10-1282; 6-15-11; Martin).

PROBATE

Viele v. Caldwell: **[guardianship of a minor]** The appellant was named temporary guardian of a minor, but at the final hearing, which the appellee mother of the child attended, the court denied the petition and found that placement of the child with the maternal grandmother was a less restrictive alternative than awarding guardianship to the appellant. In affirming, the Court of Appeals held that the trial court did not clearly err in placing the child with the grandmother, which was a feasible alternative to guardianship, and in dismissing the petition. (Gray, A.; No. CA 10-789; 6-1-11; Wynne).

Pippinger v. Benson, et al. **[adoption; intervention; grandparent and great-grandparent visitation]** The Court of Appeals found that the circuit court did not err in allowing the maternal grandmother and great-grandmother to intervene in a step-parent adoption proceeding, in ordering visitation between the child and the maternal grandmother and great-grandmother, and in denying the adoption petition. The court found that the grandmother and great-grandmother were entitled to be heard in the adoption because they had stood in loco parentis to the child. Their right to visitation was based upon the grandparent visitation statutes, which extends a right to grandparents when a natural parent is deceased. The trial court clearly considered and applied the statute and did not abuse its discretion in granting grandparent visitation under the facts of the case. Finally, the trial court did not clearly err in denying the adoption, finding that the adoption by the stepmother was not in the best interest of the child. (Boling, L.; No. CA 10-900; 6-15-11; Brown).

In the Matter of the Estate of Charlotte Stinnett, Deceased, Darrell Brown, Sr. v. Velma Ann Bell Wilson, et al.: **[jurisdiction; Ark.R.App.P.-Civ.2(a)(4); -2(b); & -4(a)]** The timely filing of a notice of appeal is a jurisdictional prerequisite for the appellate court. Here, the appellant's only point for reversal was that the circuit court erred in granting appellees' motion to strike his response. The court said the issue was whether appellant was required by Rule 4(a) to file a notice of appeal within thirty days of the order striking the response, or whether the notice of appeal was timely under Rule 2(b), an appeal from a final order that brings up for review any intermediate orders involving the merits and affection the judgment. The court noted an inconsistency between the decisions of the Supreme Court and the Court of Appeals. The court

concluded that it will look first to Rule 4 to determine timeliness of a notice of appeal and then to Rule 2 to determine if the order appealed from is an appealable order. "Rule 2 governs *which* orders are appealable, while Rule 4 governs *when* those orders must be appealed." Rule 4 uses the word "shall" while Rule 2 uses the word "may." Therefore, the court said, "if an appeal 'may' be taken under Rule 2(a), it 'shall' be taken within thirty days from entry of that order under Rule 4(a)." The court distinguished between orders appealable at an interlocutory stage and "intermediate" orders involving the merits and necessarily affecting the judgment. The court held "that the orders that 'may' be appealed at an interlocutory stage under Rule 2(a), 'must' still be appealed within thirty days of their entry as required by Rule 4(a)." Because the notice of appeal was untimely, the Court lacked jurisdiction. The appeal was dismissed with prejudice. (Yeargan, C.; No. SC 10-906; 6-23-11; Corbin).

JUVENILE

N.D. v. State: **[Transfer]** Appellant argued that the circuit court abused its discretion in allowing two witnesses to testify at the transfer hearing that were not disclosed in discovery and other issues that were not addressed on appeal. The Supreme Court noted that "the State blatantly violated Rule 17.1 [of the Arkansas Rules of Criminal Procedure] by refusing to offer the witnesses' names to the defense until 4:32 or 5:15 p.m. the afternoon before the hearing." The State also violated the circuit court's discovery order, which had been extended. The court found that the violation of the rule and trial court's order offended the notion of fair play, was highly prejudicial, and was not harmless error. (Wyatt, R., 10- 1201; 6-23-2011; Henry)

State v. A.G.: **[Transfer]** The Supreme Court found that Arkansas Rule of Appellate Procedure - Criminal 3 was incompatible with A.C.A. §9-27-313(l), that provides that any party can appeal a transfer order. Rule 3 governs and since this is not one of the types of interlocutory appeals permitted by the rule the court dismissed the State's appeal. (Wright, H.; 10-1116; 6-2-2011; Corbin)

Kelley v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that DHS failed to provide meaningful or appropriate rehabilitative services because it failed to provide her in-patient drug treatment. Appellant's argument is procedurally barred because she failed to raise the issue with the trial court and she did not appeal any prior orders in which the court found that DHS had made reasonable efforts. The court further noted that appellant's argument also failed on its merits. Appellant was referred for a drug and alcohol assessment and provided the services recommended. She offered no argument that DHS was required to go beyond the recommended services nor did she object to the services provided. (Thyer, C.; CA11-158;6-29-2011; Brown)

Fraizer v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that there was insufficient evidence as to the circuit court's finding of potential harm of continuing contact with appellant. The Court of Appeals affirmed by memorandum opinion stating that there was a

"quantum of evidence and findings to support the order."(Finch, J.; CA11-177; 6-29-2011; Gruber)

Tucker v. Arkansas Dept. of Human Services: **[TPR]** Appellants argued that there was insufficient evidence to support the trial court's finding that they failed to remedy the condition that caused removal and that termination was in the children's best interest. The trial court did not err in finding that termination was in the children's best interest and the court noted evidence of the appellants' chronic instability to the point that neither parent had progressed beyond supervised visitation at the time of the termination hearing. Although appellants had made some progress with their case plans, it is not determinative. "What matters is whether completion of the plan achieved the intended result of making the parent capable of caring for the child." (Morley, R.; CA11-4; 6-15-2011; Pittman)

Dubois v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that the termination was premature because three home studies were still pending when the termination order was entered. Appellant failed to raise the argument with the circuit court and if raised there would be no error. The court noted that A.C.A. §9-27-355 applies to initial placements and that §9-27-338(c)(3)(A) was not applicable because the child was not being cared for by a relative. (Zimmerman, S.; CA11-110; 6-1-2011; Pittman)

Baker v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that she was entitled to reasonable accommodations under the Americans with Disabilities Act (ADA). The Court of Appeals noted that the circuit court was aware that appellant was "so mentally challenged that she could not qualify even to enter the course that would prepare her for a subsequent GED preparation course." Appellate court was not presented with issue of the adequacy of the services provided under the ADA. Termination of rights affirmed. (Wilson, R.; CA10-1088; 6-1-2011; Pittman)

Martin v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that DHS failed to provide meaningful services in the form of one-on-one parenting classes. The circuit court found that DHS had not complied with the recommendation for one-on-one parenting and based its termination finding on three statutory grounds. However, appellant only argued that one ground as to meaningful reunification services was insufficient. (Finch, J.; CA11-110; 6-1-2011; Pittman)

Renfro v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that the termination was in error because there was no testimony as to adoption of her children and that the court abused its discretion in failing to grant her a continuance to obtain the consent of her father and stepmother to adopt the children. At the TPR hearing the DHS attorney provided information about two foster families that had expressed interest in adoption. The attorney ad litem asked the court to hold his ruling in abeyance on the issue of adoption. At a subsequent hearing a report was introduced and the trial judge based his ruling on the report of the proposed adoptive home. The court noted statements and arguments by counsel are not evidence and the preference for DHS to present all available evidence to the trial court. Appellant failed to show why the denial of her continuance was an abuse of discretion or how she was prejudiced. (Finch, J.; CA10-1224; 6-1-2011; Martin)

No-Merit TPR and Motion to Withdraw Cases:
Jessup v. Arkansas Dept. of Human Services: The children had remained out of the home a year and despite meaningful efforts by DHS, appellants failed to remedy the issues that caused removal, failed to comply with court orders and case plan by not addressing substance abuse issues and having stable housing. (Thyer, C.; CA11-87; 6-29-2011; Pittman)

Riley v. Arkansas Dept. of Human Services: Affirmed based on noncompliance with case plan and court order and failure to remedy the drug issues that caused removal. (Harrod, L.; CA11-136; 6-1-2011; Hoofman)

U.S. SUPREME COURT

Turner v. Rogers: **[civil contempt/counsel]** After a South Carolina family court ordered petitioner Turner to pay $51.73 per week to respondent Rogers to help support their child, Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed (twice without being jailed, twice after spending a few days in custody). The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new "show cause" order against Turner because he was $5728.76 in arrears. Both he and Rogers were unrepresented by counsel at his civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments. After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that the Federal Constitution entitled him to counsel at his contempt hearing, declaring that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.

Held :

The Fourteenth Amendment 's Due Process Clause does not automatically require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards such as the following: (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

Under the circumstances of this case, Turner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedures. Turner did not have clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial

circumstances. And the trial court did not find that he was able to pay his arrearage, but nonetheless found him in civil contempt and ordered him incarcerated.

This decision does not address civil contempt proceedings where the underlying support payment is owed to the State, *e.g.*, for reimbursement of welfare funds paid to the custodial parent, or the question what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate." (No. 10-10; 6-20-11)

Bullcoming v. New Mexico: **[confrontation clause/forensic evidence]** In Bullcoming's jury trial on charges of driving while intoxicated (DWI), the principal evidence against him was a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. Bullcoming's blood sample had been tested at the New Mexico Department of Health, Scientific Laboratory Division by a forensic analyst named Caylor, who completed, signed, and certified the report. However, the prosecution neither called Caylor to testify nor asserted he was unavailable; the record showed only that Caylor was placed on unpaid leave for an undisclosed reason. In lieu of Caylor, the State called another analyst, Razatos, to validate the report. Razatos was familiar with the testing device used to analyze Bullcoming's blood and with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. Bullcoming's counsel objected, asserting that introduction of Caylor's report without his testimony would violate the Confrontation Clause, but the trial court overruled the objection, admitted the report as a business record, and permitted Razatos to testify. Bullcoming was convicted, and the state high court held that the report's admission did not violate the Confrontation Clause because: (1) certifying analyst Caylor was a mere scrivener who simply transcribed machine-generated test results, and (2) analyst Razatos, although he did not participate in testing Bullcoming's blood, qualified as an expert witness with respect to the testing machine and lab procedures.

Held:

The Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. (No. 09-10876); 6-23-11)